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**FISCAL IMPACT STATEMENT**

**LS 6122**

**BILL NUMBER:** HB 1209

**NOTE PREPARED:** Jan 25, 2008

**BILL AMENDED:** Jan 24, 2008

**SUBJECT:** Criminal Law and Procedure.

**FIRST AUTHOR:** Rep. Smith V

**FIRST SPONSOR:**

**BILL STATUS:** CR Adopted - 1st House

**FUNDS AFFECTED:** X **GENERAL**  
**DEDICATED**  
**FEDERAL**

**IMPACT:** State & Local

**Summary of Legislation:** (Amended) This bill has the following provisions:

- A. *Pretrial Hearing for Mental Illness Claim* -- It establishes a procedure to determine whether a defendant charged with murder is an individual with a severe mental illness. It prohibits the imposition of the death penalty on a defendant found to be an individual with a severe mental illness.
- B. *Jury as Factfinder* -- It provides that a jury will serve as the factfinder in a sentencing hearing in a capital case, even if the defendant pleads guilty or is tried to the court. It permits a defendant to waive the right to impanel a jury during the sentencing hearing.
- C. *Vacating Additional Fixed Term of Incarceration* -- It allows a person: (1) convicted of certain felonies involving controlled substances; and (2) sentenced as a habitual offender; to petition the sentencing court to vacate any additional fixed term of imprisonment added to the person's sentence because the person was found to be a habitual offender. It requires the court to order the Department of Correction (DOC) to determine the person's new expected release date if the court vacates an additional fixed term of imprisonment added to the person's sentence. It requires DOC to release the person if DOC determines that the person's release date occurred before the date the court vacated the person's sentence.
- D. *Hold Harmless* -- It prohibits a person from bringing an action against the state or an employee of the state if the department determines that the person's release date occurred before the date the court vacated the person's sentence.

**Effective Date:** July 1, 2008.

**Explanation of State Expenditures:** (Revised) *Pretrial Hearing for Mental Illness Claim* -- The added

claims for reimbursement from the Public Defense Fund associated with this bill could be between \$3,600 and \$57,000. This is because the testimony from one additional psychiatrist or psychologist would be needed in a death penalty case. If the court determines by clear and convincing evidence that a defendant is severely mentally ill, then the county which is paying for the murder trial can avoid the costs of a death penalty case because the only available sentencing options for the court would be life imprisonment without parole or a determinant sentence of a specific number of years.

The added costs will depend on the following factors and are reflected in the table, below:

- How often criminal defendants in death penalty cases petition the court that they are seriously mentally ill. (The number of death penalty requests between 1997 and 2006 ranged from a high of 15 in 1998 to a low of 3 in 2003.)
- The average expense for evaluating a defendant. (LSA estimated an evaluation could range between \$2,400 and \$7,600.)
- Whether the Public Defense Fund reimburses the counties where a court is conducting a death penalty trial for 50% of these evaluations.

If the number of requests that are filed for the death penalty are within the range of the past ten years and assuming that all defendants in death penalty cases file petitions that they are seriously mentally ill, the added claims for reimbursement could be between \$3,600 and \$57,000.

Added Reimbursement Claims For The Public Defense Fund						
Range	Cost of Evaluation		Number of Trials		Public Defense Fund Reimbursement	Added Costs for Public Defense Fund
High	\$7,600	x	15	x	50%	\$57,000
Midrange	\$5,000	x	6	x	50%	\$15,000
Low	\$2,400	x	3	x	50%	\$3,600

If a defendant is found to be seriously mentally ill and the request for the death penalty is dismissed, counties would request less reimbursement from the Public Defense Fund because the prosecuting attorney would be limited to seeking either a term of life without parole or a determinant number of years. Counties would seek less reimbursement because:

- Reimbursements from death penalty cases are almost four times as high as cases in which life without parole is the most serious option and
- Counties are reimbursed for 50% of all approved expenses for death penalty cases, but 40% for all criminal cases where the death penalty is not an option.

The following shows the average costs incurred by the Public Defense Fund for death penalty and life without parole cases. The costs of a trial where the most serious sentence is a term of years was not available. The cost of these trials would likely be less expensive because the jury would meet for a single trial to determine guilt and not for an additional trial to determine the sentence.

Cost Components for Murder Trials		
	Death Penalty	Life Without Parole
Attorneys and Related Costs	\$107,804	\$27,370

*Vacating Additional Fixed Term of Incarceration* – Habitual offenders have been convicted of three unrelated felonies at different points in time. The third felony is called the underlying offense. The advisory sentence is the length of incarceration that can be either increased for aggravating circumstances or reduced for mitigating circumstances.

If a person is found by the court to be an habitual offender, the court is required to add a fixed term that is not less than the advisory sentence for the underlying offense nor more than three times the advisory sentence for the underlying offense. This added sentence may not exceed 30 years.

The habitual offender enhancement has been in statute since at least 1976. In 2001, HEA 1001 amended the statute to exclude certain drug possession felonies and if the offender was convicted of only one dealing offense from being an applicable crime that would be eligible for the habitual offender enhancement. HEA 1001 – 2001 did not have a retroactive provision, so offenders given the habitual offender enhancement prior to 2001 were not given a sentence reduction. This bill would permit a person who was sentenced as an habitual offender before 2001 with a drug possession or dealing felony as a contributing felony to petition the sentencing court to have the offender's sentence reviewed. A court finding that the person who received an habitual offender enhancement could have that portion of the sentence vacated if the court vacates this additional fixed term of incarceration. The court would have this discretion. Offenders with reduced sentences would have their release dates adjusted.

LSA identified 63 offenders in DOC facilities on October 23, 2007, with an intake date prior to July 1, 2001. Of these, 26 offenders have early release dates between 2007 and 2013.

If these offenders are released earlier than scheduled, the Department of Correction could have reduced expenditures in housing offenders in DOC facilities. On average, the variable cost for housing an additional offender in a DOC facility is \$35 per day, based on the cost of placing an offender in a county jail. The average annual cost per offender in a DOC-operated facility was \$19,185 in FY 2007.

### **Explanation of State Revenues:**

**Explanation of Local Expenditures:** *Vacating Additional Fixed Term of Incarceration* -- Courts that sentenced these offenders could experience some increase in caseload if offenders petition the courts to review there sentences to determine whether they are eligible for a sentence reduction.

(Revised) *Pretrial Hearing for Mental Illness Claim*– This bill allows defendants in a death penalty case to request within 20 days before the omnibus court date to allege that they have a serious mental illness. If a defendant files this petition, the court is required to order three disinterested psychiatrists or psychologists (one of the three must be a psychiatrist) to evaluate the defendant. The court would then consider the evaluation of the psychiatrists and psychologists and determine whether by clear and convincing evidence the defendant is seriously mentally ill. If the court determines the defendant is seriously mentally ill, the defendant would be exempt from the death penalty, but could still receive either a sentence of life imprisonment without parole or a specific number of years.

In the short term, this bill could increase the number of pretrial hearings that are held in death penalty cases

and add new costs if a panel of three psychiatrists or psychologists is required. Generally, in most death penalty cases two psychologists or psychiatrists will evaluate a defendant. This bill requires one more psychologist or psychiatrist than is generally involved in most death penalty cases to evaluate a defendant concerning the defendant's mental health at the pretrial level.

The specific cost associated with the psychological investigations will vary with each defendant. Forensic psychiatrists and psychologists that LSA contacted indicated that generally the following steps are needed to retrospectively determine a defendant's mental state:

- Face-to-face interviews
- A review of available records
- Possible interviews of other collateral sources
- Report preparation
- Possible testimony

Depending on the number of hours the psychiatrist or psychologist needs to assess the defendant and the expenses charged, the costs to perform an assessment can range between \$2,400 and \$7,600 based on psychologists and psychiatrists whom LSA contacted. Since counties are reimbursed for 50% of the approved costs and if between 3 and 15 requests for the death penalty are filed each year, the added costs for the counties could range between \$3,600 and \$57,000 (See table in *Explanation of State Expenditures*).

This bill could reduce the costs of death penalty cases for counties if a trial court judge determines that the criminal defendant is seriously mentally ill prior to the actual trial. This is because two attorneys for the defendant and more extensive investigations into the defendant's past history will not be needed if the death penalty is no longer a sentencing option. This will ultimately reduce the costs to the county that is paying for the murder trial.

*Background Information:* This proposal is similar to IC 35-36-9, which exempts defendants in murder cases from the death penalty if they prove to the court in a pretrial hearing that they are mentally retarded. If the court determines that the defendant is mentally retarded, the court is required to dismiss the death penalty petition. If the defendant either agrees to a plea bargain or is convicted of murder, the court is required to sentence the defendant to a fixed term of years. Like the provision for mentally retarded defendants, defendants bear the burden of proving that they are mentally ill to a trial court judge in a pretrial hearing. Unlike this provision, defendants who are determined to be seriously mentally ill would still be eligible for life imprisonment without parole.

Under IC 35-50-2-9(c), a defendant in a death penalty case can claim one of eight mitigating circumstances that would cause a defendant who would otherwise receive a death sentence to receive a lesser sentence. While mental illness is not included as a specific mitigator, defendants can claim "extreme mental or emotional disturbance" or "mental disease or defect" as factors that contributed to the criminal act.

In almost all death penalty cases, expert witnesses and mitigation specialists will examine the background of the defendant to determine whether any factors in the defendant's life have contributed to the defendant's criminal behavior. Instead of evidence of the defendant's background being presented before a judge and jury, the evidence will be presented to a judge in a pretrial hearing. If the judge rules that the defendant is mentally ill, then the prosecuting attorney is limited to requesting either a term of years or life without parole for the defendant. If the death penalty is no longer a sentencing option, then two attorneys for the defendant and more extensive investigations into the defendant's past history will not be needed. This will ultimately reduce the

costs to the county in which the murder trial is located.

This bill would more likely affect larger counties like Marion, Lake, and Allen because of their larger populations. In general, the trend appears for prosecuting attorneys to file fewer requests for a death penalty in recent years. Over the past ten years, the calendar year with the highest number of cases in which prosecuting attorneys have requested death penalties was in 1998 when 15 death penalty requests were filed. Since 2001, six or fewer cases have been filed each year.

<b>Capital Cases Filed by County by CY Between 1997 and 2006</b>											
County	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	10-Year Total
Adams			1								1
Allen	1	1			1	1				1	5
Carroll		1									1
Clark									1		1
Delaware		1				1					2
Elkhart		1	3				1				5
Floyd								1			1
Fulton										1	1
Gibson				1							1
Grant							1				1
Greene				1							1
Harrison				1							1
Henry		1									1
Jackson									1		1
Jasper		1									1
Johnson		2									2
Knox				1							1
Lake	3	1						3			7
Madison								1			1
Marion	3	5		1	1	1	1		2	1	15
Miami								1			1
Morgan	1				1						2
Parke									1		1
Pike										1	1
Porter			2	1	1						4
Spencer					1						1
St. Joseph	1		1	2		1					5
Tippecanoe									1		1
Vanderburgh					1					1	2
Vigo		1								1	2
Wabash	1										1
<b>Grand Total</b>	<b>10</b>	<b>15</b>	<b>7</b>	<b>8</b>	<b>6</b>	<b>4</b>	<b>3</b>	<b>6</b>	<b>6</b>	<b>6</b>	<b>71</b>
Source: Indiana Supreme Court											

The Public Defender Council reports that between 1994, when the law exempting mentally retarded

defendants from the death penalty was enacted, and 2005, prosecuting attorneys have requested death penalties in 107 cases. Of these 107 defendants, 8 defendants in death penalty cases have petitioned to prove that they were mentally retarded. In three of these cases, the trial judge found the defendant mentally retarded and dismissed the death penalty. In another four cases, after evidence of mental retardation was developed and presented to the judge, the parties resolved the case by plea agreement before the judge made a ruling. Only one was sentenced to death.

LSA also identified 8 out of 153 cases decided between 1990 and 2000 in which defendants in death penalty cases had the death sentence either dismissed or overturned because of a mitigating factor associated with extreme emotional distress or a mental disease or defect.

Two trials occur in death penalty cases:

- A trial to determine a defendant's guilt.
- A subsequent trial to determine whether the defendant should receive the death penalty.

All criminal defendants have a constitutional right to a jury trial. Under current law, death penalty defendants who either waive their right to a jury trial or plead guilty during the guilt phase automatically waive their right to a jury trial during the sentencing phases. As proposed, this bill would allow a defendant to have a jury trial during the sentencing phase even if the defendant waived the right to a jury trial during the guilt trial.

In practice it is common for prosecuting attorneys to drop the request for the death penalty and offer either a determinate sentence (a specific number of years in prison) or life imprisonment without parole if the defendant pleads guilty.

Between 1995 and 2006, the Indiana Supreme Court reported that prosecuting attorneys filed death penalty requests in 86 cases. Of these, 58 resulted in a plea agreement where the defendant received either life without parole or a term of years. Of the 28 cases that were decided by a jury, 12 received a death sentence and 15 received either life without parole or a determinate sentence.

<b>Results of Death Penalty Requests Between 1995 and 2006</b>		
<u>Outcome</u>	<u>Plea Agreement</u>	<u>Jury</u>
Acquitted		1
Life Without Parole	38	11
Death	1	12
Term of Years	<u>19</u>	<u>4</u>
Total	<u>58</u>	<u>28</u>

*Jury as the Fact-finder in Sentencing Hearing in a Capital Case* – There is expected to be a minimal effect on counties since this is the most common practice observed by prosecuting attorneys and sentencing courts.

#### **Explanation of Local Revenues:**

**State Agencies Affected:** Department of Correction; Public Defender Council; State Public Defender; Attorney General; Department of Correction; Indiana State Police.

**Local Agencies Affected:** Trial courts; Prosecuting attorney's office; County sheriffs.

**Information Sources:** Testimony of Paula Sites, Assistant Executive Director, Indiana Public Defender Council, Bowser Commission, August 17, 2007; Indiana Supreme Court; Department of Correction.

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